

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDY L. LYTTLE

Claimant

VS.

J & J/BMAR JOINT VENTURES, LLP

Respondent

AND

COMMERCE & INDUSTRY INS. CO.

Insurance Carrier

Docket No. 1,029,543

ORDER

Claimant requested review of the May 14, 2008 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on August 5, 2008.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. John B. Rathmel, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition to the items listed by the ALJ, both claimant and respondent agree that Dr. Steven Peloquin's deposition is to be considered part of the record for purposes of this Appeal.

At oral argument, the parties agreed that claimant's average weekly wage should have included the overtime paid to claimant but which was excluded by the ALJ. Thus, claimant's average weekly wage, pursuant to the parties' stipulation, is found to be \$604.50 and the Award is therefore modified to reflect this change.

In addition, the parties agree that the ALJ failed to correctly convert the temporary partial disability payments so as to properly account for the weeks of benefits paid to

claimant before the final Award was issued. Thus, when all of the temporary benefits are added together, the figure reflects the equivalent of 61.5 weeks of temporary total disability benefits were paid rather than the 82 weeks stated in the Award. The Award will be modified to reflect this corrected figure.

Finally, the parties agreed that the evidence is uncontroverted that claimant's post injury average weekly wage (AWW) was \$348.75 for the period September 6, 2005 to January 8, 2008. This translates to a 42 percent wage loss (when comparing the pre-injury AWW). On January 8, 2008, the claimant obtained full-time employment and began earning \$481.52 per week, which translates to a 20 percent wage loss.

ISSUES

The ALJ concluded that claimant's injury left her with a 19 percent permanent partial impairment to the right lower extremity. And because this was a scheduled injury, he denied her request for permanent partial general (work) disability under K.S.A. 44-510e(a).

Claimant appealed this Award and alleges the ALJ erred in concluding her impairment is limited to her right lower extremity. Claimant argues that her right ankle injury gave rise to a condition known as complex regional pain syndrome (CRPS) and that condition has caused an altered gait and ultimately a permanent impairment in her low back, necessitating her need to walk with crutches, at times, and a walker. Thus, she is entitled to an 18 percent functional impairment to the body as a whole and also to a work disability based upon her 79 percent task loss and her 20-42 percent wage loss¹ since leaving her job with respondent. Claimant also alleges the ALJ erred when he failed to designate Dr. Peloquin as the designated treating physician to monitor her condition and medications.

Respondent contends that the ALJ's Award should be affirmed. Respondent believes Dr. Peloquin's testimony is not reliable and that the ALJ correctly disregarded Dr. Delgado's opinions as inconsistent with the Supreme Court's recent pronouncement in *Casco*². Thus, the ALJ appropriately relied on Dr. Stein's opinions in awarding a scheduled injury to the right lower extremity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

¹ Claimant's Brief at 18 (filed June 30, 2008).

² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

Claimant sustained a compensable injury on July 8, 2004 when she twisted her right ankle while at work. After her accident, respondent provided treatment with Dr. William Jones, an orthopaedic surgeon, during the course of that treatment, claimant's symptoms did not improve. Dr. Jones referred claimant to Dr. Steven Peloquin, a pain management physician, for further evaluation of her growing complaints. Dr. Peloquin examined her, identified some vasomotor instability, allodynia and a number of other symptoms which led him to diagnose her with complex regional pain syndrome (CRPS)³

According to Dr. Peloquin, the extreme pain in claimant's right lower extremity has given rise to an altered gait. And the altered gait has irritated her low back and sacroiliac joints. He further opined that all of these complaints are attributable to her July 8, 2004 accident. Claimant's treatment has included pain medications, a dorsal column stimulator as well as injections in the facet joints in her spine. Dr. Peloquin has also prescribed a walker to aid claimant's walking and lessen the weight on her right ankle along with a whirlpool to provide a means of relaxing claimant's muscles.

Dr. Peloquin testified that he believed claimant bears a permanent impairment, but that he was not in a position to offer any such rating. He did, however, opine that she had lost the ability to perform 75 percent of the tasks outlined by Dick Santner.

Claimant was evaluated by Dr. Sergio Delgado on January 25, 2007, at her lawyer's request. Dr. Delgado confirmed claimant's RSD diagnosis⁴ and assigned an 18 percent to the body as a whole. Dr. Delgado explained that he used Table 68 of the *Guides*⁵ and "added the sensory values with the lower extremities and gave her that [18 percent] as an impairment rating."⁶ He further testified that Table 68 recommends a body as a whole rating. He also added that "she had radiation of pain into the back and leg, and I thought a whole person was better than a single leg impairment."⁷ Dr. Delgado testified that he believed claimant had a 21 percent task loss, again using Mr. Santner's task history analysis.

At respondent's request, claimant was referred to Dr. Paul Stein for evaluation of the nature and extent of her impairment. Following his examination Dr. Stein assigned a 19 percent permanent partial impairment to the right lower extremity due to pain and loss

³ Peloquin Depo at p 6-7. This condition is sometimes referred to as reflex sympathy dystrophy (RSD).

⁴ As noted above, RSD is also known as CRPS.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁶ Delgado Depo. at 10.

⁷ *Id.* at 20.

of range of motion at the ankle. Dr. Stein reported that while claimant's injury resulted in "diffuse chronic pain syndrome affecting the right lower extremity" he could not definitively diagnose CRPS based on his physical examination.⁸ And although claimant expressed some complaints about her low back and even in her left lower extremity, he did not assign any impairment ratings to any other portion of her body other than the right lower extremity.

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence.⁹

The ALJ adopted Dr. Stein's evaluation of claimant's permanency and awarded a 19 percent permanent partial impairment to the right lower extremity. The ALJ apparently did not have the benefit of Dr. Peloquin's deposition testimony and he specifically found that "Dr. Delgado's opinion is insufficient to establish that the claimant has any functional impairment."¹⁰ Thus, the only impairment rating left was that offered by Dr. Stein and that formed the basis for the ALJ's Award.

The Board has considered all of the evidence contained within the record and finds that the Award should be modified. For whatever reason, Dr. Peloquin's deposition was not considered and as the treating physician, particularly in light of the facts of this case, his opinions carry significant weight. He has treated claimant for an extensive period of time and in addition to other treatment modalities he oversees the implanted device that helps control her ongoing pain issues. It is unfortunate that Dr. Peloquin did not assign a permanent impairment value to claimant's condition. Nonetheless, he testified that when considering the definition of impairment set forth in the *Guides*, she is permanently impaired in her right ankle, right lower extremity, low back and her bilateral sacroiliac joints.¹¹ He did, go on to add that "I am not trained to rate people to do disability ratings, so I have to qualify my statement."¹²

Had Dr. Peloquin gone ahead and assigned a numerical sum to the low back and lower extremity impairment and that opinion were to be accepted by the Board, claimant would be entitled to a permanent partial *general* impairment under K.S.A. 44-510e(a) rather than a scheduled injury under K.S.A. 44-510d. And a majority of this Board finds

⁸ Dr. Stein's IME Report at 4 dated March 16, 2007. This report was stipulated into evidence by the parties.

⁹ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

¹⁰ ALJ Award (May 14, 2008) at 3.

¹¹ Peloquin Depo. at 11.

¹² *Id.*

that the scheduled injury to the lower extremity should be converted to a whole body impairment and then combined with the impairment to the back, leaving claimant with a body as a whole impairment which, under K.S.A. 44-510e(a), entitles her to further consideration of her wage and task loss.¹³

Unfortunately, Dr. Peloquin did not rate claimant's back impairment. Neither did Dr. Stein as he concluded that claimant's impairment was limited to her right lower extremity. Only Dr. Delgado rated claimant's back complaints and even then, he only provided a body as a whole impairment based upon a chart that considered only the lower extremity's sensory deficits and provided the convenient conversion to a whole body rating. And despite what Dr. Delgado says, there is no indication within the referenced Table that suggests that sensory deficits to a lower extremity are to be given a whole body impairment. His own testimony made it clear that his impairment rating is solely for the leg complaints and not for the low back pain.

The fact that claimant's low back has become symptomatic is understandable given the fact that she uses a walker or crutches to limit the weight on her right lower extremity. And the use of those devices are taking a toll on her low back leaving her with an impairment that extends beyond just her right lower extremity. Even Dr. Delgado noted that claimant had low back complaints and used assistive devices but, for whatever reason, did not assign any impairment for those complaints.

After considering all of the evidence, the majority of the Board is persuaded that the claimant bears a permanent partial impairment to her right lower extremity as well as her low back as a direct and natural result of her July 8, 2004 compensable accident. And the majority also finds that the lower extremity rating must be converted to a whole body rating and then combined with the low back impairment rating.¹⁴ Unfortunately, the Board also finds that claimant failed to establish the extent of her permanency to her back.

So, while that portion of the ALJ's Award that grants a permanent impairment to the right lower extremity (which is converted to 8 percent to the whole body)¹⁵ is affirmed, the ALJ's conclusion that the nature of claimant's impairment is limited to her right lower extremity is reversed. And the majority of the Board specifically finds that claimant has sustained a permanent partial impairment to her low back. Claimant did not, however,

¹³ *Barnes v. Galamet*, No. 1,022,469, 2008 WL 4149959 (Kan. WCAB Aug. 29, 2008); *Cantu v. Core-Mark*, No. 1,023,429, 2008 WL 4149960 (Kan. WCAB Aug. 29, 2008). A minority of the Board has concluded that *Casco* requires scheduled impairments to be calculated separately in spite of the fact that a body as a whole impairment is involved.

¹⁴ *Carleton v. The Boeing Company*, No. 1,023,991, 2007 WL 2296128 (Kan. WCAB July 06, 2007).

¹⁵ Based on the conversion tables contained within the *Guides*, the 19 percent to the lower extremity is equivalent to an 8 percent whole body impairment.

prove the extent of the functional impairment to her low back so claimant's permanent partial functional impairment is limited to the 8 percent to the whole body. That evidentiary failure does not defeat her ability to recover a permanent partial general (work) disability, to the extent that it exceeds her functional impairment.¹⁶

Because claimant's injury resulted, in part, in an unscheduled impairment, she is entitled to a permanent partial general disability. Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based upon all the evidence, including expert testimony, concerning the capacity to earn wages.¹⁷

Here, claimant continued to work for respondent for over a year after her injury. While off work for treatment and surgery to implant her pain device, she received temporary total disability benefits, at least up to the point when she was released to return to work. When the respondent lost its contract at Ft. Riley, Kansas, claimant lost her job. Claimant sought employment with a temporary agency and was paid temporary partial disability benefits for a period of time and fortunately for her, she was retained by her temporary employer and received a full-time permanent position that allows her to accommodate her restrictions. During the period she was receiving temporary partial disability her wage loss was 42 percent and as of January 8, 2008 her wage loss decreased to 20 percent. There is no allegation nor evidence to suggest that claimant is underemployed thus her actual wages will be used to calculate her wage loss.

There are two opinions as to claimant's task loss and the Board finds no reason to accept one over the other and therefore averages the two to find a 50 percent task loss. When the 50 percent task loss is averaged with the 42 percent and 20 percent wage loss periods, the result is a 46 percent work disability from December 14, 2006 (the date she was found to be MMI) up to January 7, 2008. As of January 8, 2008, when she accepted full-time employment her work disability decreased to 35 percent.

Finally, the Board finds that Dr. Peloquin should be designated as the ongoing treating physician. Drs. Stein and Delgado both agree that claimant requires continued monitoring given her pain medications and her implanted device. Thus, the Award is

¹⁶ *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348 (1989).

¹⁷ *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999). This analysis has recently been called into question based upon the Supreme Court's analysis in *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

modified to reflect this designation and Dr. Peloquin shall continue in that position until claimant is released from his care or until further order of the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 14, 2008, is affirmed in part and modified in part as follows:

The claimant is entitled to 61.50 weeks of temporary total disability compensation at the rate of \$403.02 per week or \$24,785.73 followed by 128.98 weeks of permanent partial disability compensation at the rate of \$403.02 per week or \$51,981.52 for a 46 percent work disability, making a total award of \$76,767.25.

As of September 29, 2008 there would be due and owing to the claimant 61.50 weeks of temporary total disability compensation at the rate of \$403.02 per week in the sum of \$24,785.73 plus 128.98 weeks of permanent partial disability compensation at the rate of \$403.02 per week in the sum of \$51,981.52 for a total due and owing of \$76,767.25, which is ordered paid in one lump sum less amounts previously paid.

Dr. Peloquin is appointed as the authorized treating physician and shall continue in that position until claimant is released from his care or until further order of the Court.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of September 2008.

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and its determination that claimant has a permanent partial impairment to her low back (although she failed to prove the percentage of this impairment) and is therefore entitled to a work disability. However, we disagree with the majority's conclusion that the claimant's percentage of functional impairment for her scheduled injury to her right lower extremity should be converted to a body as a whole rating for purposes of combining it with a zero percent functional impairment for the low back complaints. We read *Casco* to require the scheduled injury to be compensated separately.

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

...

K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.¹

Because the lower extremity is contained within the schedule of K.S.A. 44-510d(a), claimant's disability to that extremity must be compensated according to the schedule at the 190 week level. The low back, however, is not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

All of claimant's injuries occurred as a direct result of a work-related accident. Nevertheless, claimant's lower extremity injury is contained within the schedule of injuries in K.S.A. 44-510d. Therefore, claimant's permanent disability resulting from her lower extremity injury is compensable as a separate scheduled injury based upon his percentage of functional impairment for that injury alone.

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the majority's opinion. This member is not persuaded by the opinions expressed by Dr. Peloquin and would find that claimant sustained only a separate scheduled injury to her right lower extremity as a result of her work-related accident.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge